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No. 468

Supreme Court of the United States

OCTOBER TERM, 1953

ARTHUR JOST, *Petitioner*,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL FOR THE FOURTH APPELLATE DISTRICT OF CALIFORNIA

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No. .....

ARTHUR JOST, *Petitioner,*

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL FOR THE FOURTH APPELLATE DISTRICT OF CALIFORNIA

Petitioner, the West Coast Director of the Mennonite Central Committee and a conscientious objector to military service, was refused naturalization. He prays that a Writ of Certiorari issue to review the final judgment of the District Court of Appeal for the Fourth Appellate District of the State of California, entered on April 20, 1953 (R. 100-10), affirming the order of the Superior Court of the State of California in and for the County of Fresno, which denied petitioner's petition for naturalization (R. 31-32).

OPINIONS BELOW

The opinion of the Superior Court denying the petition for naturalization is unreported, but is set out at R. 22-32. It is the controlling opinion below and should be read in full.

The opinion of the District Court of Appeal, affirming this order (R. 100-10), is reported at 117 Cal. App. 2d 469 (advance), 256 P. 2d 71. It disposes of the case perfunctorily and with no consideration of the principles at stake.

JURISDICTION

On May 25, 1950 (R. 8-9), petitioner filed his petition for naturalization in the Superior Court of the State of California in and for the County of Fresno, under § 301 of the Nationality Act of 1940, as amended, 54 STAT. 1140, 8 U.S.C. § 701 (now reenacted as 8 U.S.C. § 1421). On January 4, 1952, after a hearing, that court denied the petition (R. 32), and the District Court of Appeal for the Fourth Appellate District duly affirmed this order on April 20, 1953 (R. 100-10). Rehearing was denied by that court on May 15, 1953 (R. 110), and a timely Petition for Hearing in the Supreme Court of California, the highest court of the state, was denied on June 18, 1953 (R. 111). Since the judgment of the District Court of Appeal definitively disposed of the case and was not subject to further review under applicable local law, it is a final judgment of the state court of last resort.[1] The time within which to file a

[1] The writ is properly directed to the District Court of Appeal and not to the Supreme Court of California. Rochin v. California, 342 U. S. 165, 167; Parker v. County of Los Angeles, 338 U. S. 327, 332; Pacific Gas & Electric Co. v. Police Court, 251 U. S. 22, 24-25. *Cf.* Western Union Telegraph Co. v. Priester, 276 U. S. 252; Ameri-

Petition for a Writ of Certiorari in this Court was extended to November 14, 1953, by an order signed by Mr. Justice Clark on September 15, 1953 (R. 112), pursuant to 28 U.S.C. § 2101 (c). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

QUESTIONS PRESENTED

1. Mennonite teaching asserts that under no circumstances may human life be taken; that war is contrary to the teaching of Christ and is a sin; that no Christian may engage in it or assist or support those who do; but that one may give help and succor to the victims of war as of other disasters. Being a non-hierarchical church, the application of its teachings is left to the individual conscience. A large group of Mennonites, of whom petitioner is one, and of whom the Mennonite Central Committee is typical, believes that these teachings require objection to any military service whether combatant or not, although they will act as civilians to relieve suffering, even on the battlefield; other devout Mennonites perform noncombatant military service as members of the armed forces, although they will not carry arms or fight or kill, even under orders. The question is whether, under these circumstances, if petitioner shows by undisputed evidence that his individual objection to noncombatant as well as combatant military service is sincerely and genuinely held by reason of his religious training and beliefs, he is entitled to take the conscien-

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can Railway Express Co. v. Levee, 263 U. S. 19. Hearing by the California Supreme Court is discretionary and the denial thereof has the same significance as denial of certiorari by this Court. CALIF. CONST. Art. VI, §§ 4, 4(c); Rules on Appeal, Rules 28-29, 36 Cal. 2d 24, 25 (1951); People v. Davis, 147 Cal. 346, 350, 81 Pac. 718, 719 (1905); Bohn v. Bohn, 164 Cal. 532, 537, 129 Pac. 981, 984 (1913).

tious objector's oath and to be naturalized under § 335 of the Nationality Act of 1940, as amended by § 29 of the Internal Security Act of 1950, or whether under this statute he may properly be denied this right because he cannot go further and prove that all members of his communion reach the same belief from the same religious training.

2. After an extended dialectical exchange between the trial judge and petitioner, the former declared that he was not satisfied that Mennonite teaching as interpreted and expounded by petitioner (a) had adequate scriptural support, (b) would have been a good thing for the United States if widely held from Valley Forge to Korea, and (c) forbade petitioner to serve in the armed forces as a noncombatant. Hence, the judge concluded that petitioner had not shown himself to be entitled "by reason of religious training and belief" to take the conscientious objector's oath and to be naturalized. The state appellate court affirmed this decision as a proper denial of the naturalization petition on the ground that "doubt remains in the mind of the court" as to an essential matter of fact (R. 104). The question is whether the courts below seriously misinterpreted the federal statute in imposing on petitioner a burden of proof which required elimination of all doubt in the trial judge's mind, since the statutory requirement of "clear and convincing evidence . . . to the satisfaction of the naturalization court" does not impose the standard followed below of proof beyond any doubt or even of proof beyond a reasonable doubt, but calls for a more realistic and possible burden which was met by admittedly uncontroverted evidence on every relevant issue.

3. The state appellate court affirmed the decision of the naturalization judge as an exercise of the discretion vested in him by § 335 of the Nationality Act of 1940, as amended. The question is whether this was a correct interpretation and application of this important federal statute, or whether in view of the judge's strong disapproval of the doctrine of nonresistance in general and of petitioner's theological position and of petitioner specifically, the judge was concluding as a matter of law that since Mennonite doctrine was not universally accepted as condemning *in haec verba* noncombatant military service, those, like petitioner, who did so believe were not entitled to be naturalized.

STATUTE INVOLVED

The petition for naturalization in this case, filed on May 25, 1950, was disposed of under the applicable provisions of the Nationality Act of 1940, as amended by the Internal Security Act of 1950. Sections 335(a) and (b) of the Nationality Act, as so amended by § 29 of the Internal Security Act (64 STAT. 1017-18, 8 U.S.C. § 735) are as follows:

> "Sec. 335. (a) A person who has petitioned for naturalization shall, before being admitted to citizenship, take in open court one of the oaths set forth in subsection (b) of this section (1) to support the Constitution of the United States; (2) to renounce and abjure absolutely and entirely all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which the petitioner was before a subject or citizen; (3) to support and defend the Constitution and the laws of the United States against all enemies, foreign and domestic; (4) to bear true faith and allegiance to the same; and (5) to bear arms on behalf of the United States when required by law, or to perform noncombatant service in the Armed Forces

of the United States when required by law: *Provided,* That any such person shall be required to take the oath prescribed in subsection (b) (1) of this section unless by clear and convincing evidence he can show to the satisfaction of the naturalization court that he is opposed to the bearing of arms or the performance of noncombatant service in the Armed Forces of the United States by reason of religious training and belief: *Provided further,* That in the case of the naturalization of a child under the provisions of Section 315 or 316 of this Act the naturalization court may waive the taking of either of such oaths if in the opinion of the court the child is unable to understand their meaning.

"(b) As provided in subsection (a) of this section, the petitioner for naturalization shall take one of the following oaths:

"(1) I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I will bear arms on behalf of the United States or perform noncombatant service in the Armed Forces of the United States when required by law; and that I take this obligation freely without any mental reservation or purpose of evasion: So help me God. In acknowledgment whereof I have hereunto affixed my signature; or

"(2) I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United

States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I take this obligation freely and without any mental reservation or purpose of evasion: So help me God. In acknowledgment whereof I have hereunto affixed my signature."

Although these provisions were repealed by § 403 (a)(42) of the Immigration and Nationality Act of June 27, 1952 (66 STAT. 280), they were reenacted as § 337 (a) of that Act (8 U.S.C. § 1448(a)), with changes not material to the issues here presented.[1] For the convenience of the Court, the amended provisions of the Immigration and Nationality Act now in effect are set forth in an Appendix to this petition.

STATEMENT

Petitioner, Arthur Jost, was born in Canada in 1918 (R. 1, 8, 35). He lawfully entered the United States for permanent residence in 1927 at the age of eight and has lived here at all times since that time (R. 2, 8, 35). He resides at Reedley, Fresno County, California, is married to a native-born United States citizen, and has three children, all native-born United States citizens (R. 1-2, 35). He is a member of the Mennonite Brethren Church (R. 14, 44, 53), the West Coast Director of the Mennonite Central Committee and the Director of that faith's mental hospital, Kings View Home, at Reedley, California (R. 14). He asserts that he is a conscientious objector to service in the armed forces.

On May 25, 1950, petitioner filed his petition for

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[1] Section 405(b) of the Immigration and Nationality Act of 1952 specifically provides that petitions for naturalization which were filed before its enactment shall be heard and determined in accordance with the requirements of law in effect when they were filed.

naturalization as a United States citizen in the Superior Court for Fresno County, California (R. 8-9), pursuant to the then applicable provisions of § 301 of the Nationality Act of 1940, 8 U.S.C. § 701. As a conscientious objector, he sought to take the alternative oath prescribed by § 335(b)(2) of that Act (as amended by § 29 of the Internal Security Act of 1950, 64 STAT. 1017-18, *supra*, pp. 5-6), which oath is available to those who can show "by clear and convincing evidence . . . to the satisfaction of the naturalization court" that they are "opposed to the bearing of arms or the performance of noncombatant service in the Armed Forces of the United States by reason of religious training and belief".

In accordance with § 333(a) of the Nationality Act of 1940, as amended by § 28 of the Internal Security Act of 1950 (8 U.S.C. § 733), his petition was referred to an employee of the Immigration and Naturalization Service of the Department of Justice for preliminary examination and recommendation. After conducting an investigation, this naturalization examiner filed a report, dated March 15, 1951, which contained a finding that petitioner had failed to show that his refusal to bear arms or perform noncombatant service in the armed forces of the United States was based on his religious training and belief, and which recommended that the petition for naturalization accordingly be denied (R. 8-13). Pursuant to § 333(b) of the Nationality Act of 1940, as amended, the record of this preliminary examination was duly transmitted to the Commissioner of Immigration and Naturalization, who in turn filed findings of fact, conclusions of law and a recommendation directly contrary to those of the designated naturaliza-

tion examiner.[1] This report, dated August 7, 1951, contained the finding that "the petitioner has established by clear and convincing evidence that his refusal to bear arms or perform noncombatant service in the armed forces of the United States is based on his religious training and belief", and recommended that the petition for naturalization be granted (R. 14-22).

1. The Undisputed Facts as Shown by Petitioner

On November 4, 1951, a final hearing on the petition was held before Judge Arthur C. Shepard of the Superior Court for Fresno County, in accordance with § 334 of the Nationality Act of 1940, as amended. Petitioner appeared at this hearing without counsel. No conflicting evidence on any material issue was developed, either in the record of the examining officer (introduced in evidence in accordance with § 333(a) of the Nationality Act of 1940, as amended), or in the testimony taken in open court. The evidence is uncontroverted that:

(1) Petitioner was raised in a Mennonite family (R. 62); his early religious training was in the Krimmer Mennonite Brethren Church (R. 63). He has been an active member of the Mennonite Brethren Church for many years, and is a member of its conference committee (R. 14, 44, 51). In addition, he serves as West Coast Administrator of the Mennonite Central Committee, and he is employed as Director of the Menno-

[1] The trial court, obviously not being familiar with the provisions of § 333(b) as amended, which require the recommendation of the naturalization examiner to be transmitted to the Commissioner, attributed the Commissioner's report to having been done on "his own on direct application of petitioner or persons interested in the granting of petitioner's petition." (R. 23-24).

nite mental hospital, Kings View Home, in Reedley, California (R. 14, 51).

(2) During World War II, petitioner, a resident alien, registered under the Selective Training and Service Act of 1940 (54 STAT. 889) as a person "who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form", including specifically service in the armed forces in either a combatant or noncombatant capacity. Under the provisions of that Act he was given a 4-E classification; he served approximately four years under the Civilian Public Service Program for conscientious objectors (R. 10, 14-15, 36), which was a recognition by the Selective Service System that he was a sincere religious objector to war and to noncombatant as well as combatant service.[1]

(3) Petitioner is willing again, if called upon to do so, to serve the United States in any way compatible with his Christian principles on nonresistance (R. 15, 36). He is willing to render medical service during any war, as a civilian, including service on the battlefield itself (R. 15, 47-48), and to do other civilian work beneficial to the suffering members of society (R. 36-37). He is not willing, however, to render such service as a part of the armed forces—"the military machine", as he put it (R. 65, 85). He could not work in a "war plant", buy defense bonds, or do anything directly connected with furtherance of a war effort (R. 15).

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[1] The trial court did not appreciate that petitioner had been recognized as a sincere conscientious objector by the Selective Service System. The court's version of this situation was (R. 23): "He *claimed* exemption from military service in World War II as a Conscientious Objector. He *refused* to wear a uniform and spent most of the war in Civil Works Projects." (Italics supplied).

(4) Petitioner testified that his objection to service in the armed forces, whether combatant or noncombatant, is part of his broader objection to participation in the injury of others under any circumstances. He would not shoot or kill another human being, or harm another person, even in defense of his own life, or of the lives of members of his family (R. 49).

(5) Petitioner's testimony is not disputed that the greatest influence in his life came from the Mennonite Church and from his parents (R. 70). He was trained as a child to believe that the Mennonite principle of nonresistance meant abstention from participation in the military organization (R. 64-67).[1] This testimony was corroborated by statements by his step-mother and three brothers, submitted to and duly offered in evidence by the naturalization examiner, to the effect that petitioner and other children in the family were trained in the Mennonite principle of nonviolence, and specifically, that "Arthur Jost as a son and as a brother has consistently been taught to serve in alternate service outside of the armed services", and that his beliefs are "a logical expression of the training that our home has given to the children who have come from this home" (R. 62).[2] It was further supported by an af-

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[1] Petitioner's testimony is also clear that the fact that his father (now deceased) could not be naturalized at a time when willingness to accept military service was required under the law as then interpreted made a lasting impression upon him (R. 64).

[2] The naturalization examiner in his unfavorable report on the petition for naturalization attempted to discredit this statement by the argument that it must be untrue because petitioner's mother had herself been naturalized some years previously at a time when this could not have been done under the law if her religious position was as described in this statement (R. 11). At the final hearing in open court, however, petitioner testified that in fact she was his step-mother and was a native-born American citizen. She had mar-

fidavit of the pastor of the Krimmer Mennonite Brethren Church in Hillsboro, Kansas, who was the Jost family minister from 1928 to 1937, during petitioner's formative years. This affiant stated that, based on his close acquaintanceship with and knowledge of petitioner and his home, parents and religious background, he believed that petitioner's present convictions were conscientiously and consistently developed from the religious teaching he received during this early period in his home and his church (R. 63).

The naturalization examiner's report admitted that the evidence showed that petitioner was "conscientiously opposed to killing" (R. 10); it went on to recommend denial of the petition, however, on the ground that petitioner had not proved that his objection to noncombatant service as a uniformed member of the armed forces was *required* by the dogma or creed of the Mennonite Church: ". . . if the organization as a whole does not teach, instruct, or train its members to refuse to perform noncombatant service then the individual members cannot claim that they receive religious training through the organization to that effect" (R. 12). From this the examiner reached the startling conclusion, in spite of his other finding that petitioner was "conscientiously opposed to killing" and in spite of petitioner's statement that he was willing to render medical service on the battlefield in a civilian capacity (R. 48), that "the petitioner's refusal to bear arms or to perform noncombatant service in the Armed

ried his father in 1927, when he was eight years old, and had gone to Canada with his father for only a few months prior to the time the whole family moved to Kansas (R. 82). At this point the naturalization examiner stated on the record, "That is my error. My assumption." *Ibid.*

forces of the United States is based upon a personal fear for his own safety, and he is merely attempting to stretch the training of his organization that 'Thou Shall Not Kill' to include refusal to wear the uniform." (R. 12).

As noted above, the naturalization examiner's superior, the Commissioner of Immigration and Naturalization, realized that these findings were based upon an erroneous hypothesis and recommended that the petition for naturalization be granted (R. 14-22). The state courts, however, as we shall see, followed the examiner's erroneous interpretation of the statute and adopted his recommendation instead of that of the Commissioner.

2. The Mennonite Churches and Their Teachings

The naturalization examiner and the courts below were hopelessly confused with respect to the history and teachings of what the examiner called "the organization as a whole" (R. 12). It was here—and only here—that both the trial judge and the appellate court thought they found "conflicting" evidence. Therein lay the source of their error. In fact there is not the slightest conflict in the relatively slim evidence in this record, nor in the mass of material contained in the many authoritative published works of which this Court may take judicial notice, with respect to the Mennonite churches or their teachings.

There is unquestionably a good deal of evidence, in and out of the record, that within various Mennonite groups there exists considerable divergence of view with respect to various aspects of Mennonite teaching and doctrine. Many unquestionably believe that, while combatant military service is utterly forbidden, it is a matter for the individual conscience to decide whether

noncombatant military service can be reconciled to the doctrine of nonresistance which all accept. The naturalization examiner in his investigation apparently sought out those who held this view and included their statements in his report (R. 53-56). To some extent this view was also held by a witness brought to the hearing by petitioner (R. 84). And in 1948, a conference of the Mennonite Brethren Church of North America—one of the two groups with which Arthur Jost has been affiliated—adopted a resolution which permitted *those who could conscientiously do so* to accept noncombatant service in the Medical Corps (R. 44, 45-46; see Jost's comments, R. 49).

On the contrary, as we shall see, the dominant and historic view of the Mennonite organization "as a whole" supports Arthur Jost's view that noncombatant as well as combatant service in the armed forces is forbidden. But it would not matter, of course, if this were not the case, because this is not the statutory test. Jost's convictions "by reason of religious training and belief" are not dependent upon his belonging to a majority or minority of a communion upon a doctrinal point. Still less do they depend upon his belonging to a religious organization which through hierarchical discipline can eliminate dissent. Nor should it surprise us that a religious organization can at the same time contain two views which have been regarded as in conflict. Professor Neale, telling us of the religious settlement in England which led to the Elizabethan Prayer Book of 1559, points out that as to one of the main controversies of the Reformation the English solution was to accept both positions. "The first half," he says, "was the formula of the 1549 Book implying a real presence; the second was that of 1552, and was Swiss doctrine. In this strange amalgam, now sanc-

tified by the usage of centuries, we can see where the Queen stood fast, and the divines stood fast."[1] The Mennonites were not the first to leave scope for individual faith.

When the naturalization examiner spoke of "the organization as a whole", he really opened Pandora's box. The Mennonite churches have no hierarchy in the accepted sense (R. 68). As the trial judge himself said, they recognize "no supervising church authority to speak for them or to promulgate or dictate any religious doctrine, dogma or creed" (R. 24). In the United States alone, there are some sixteen identifiable church groups of Mennonites,[2] including the Krimmer Mennonite Brethren Church in which petitioner had his early religious training (R. 63), and the Mennonite Brethren Church of which he is now a member (R. 14, 44, 51).

During the entire conscription period 1940-1947, 9,809 Mennonites, belonging to these groups, were classified for service. Of these, 3,876, or 39.5% of the whole, accepted full combatant service. Only 1,397, or 14.2%, accepted noncombatant military service. The remainder, 4,536, or 46.2%, refused all military duty and were classified for Civilian Public Service. To put it another way, those who refused combatant service, in accordance with the universally accepted Mennonite doctrine, numbered 5,933. Of these, three-quarters, 4,536, like Jost, refused all military service, and only one-quarter accepted noncombatant military service.[3]

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[1] NEALE, ELIZABETH I AND HER PARLIAMENTS, 1559-1581, p. 78 (British Book Center, Inc., New York).

[2] HERSHBERGER, THE MENNONITE CHURCH IN THE SECOND WORLD WAR, p. 39 (1951).

[3] *Ibid.* See also SELECTIVE SERVICE SYSTEM, SPECIAL MONOGRAPH NO. 11, VOL. 1, CONSCIENTIOUS OBJECTION, p. 321 (1950).

While this is, of course, not conclusive, we think it very relevant to the "religious training and belief" of "the organization *as a whole*". As to the individual church groups, the figures vary greatly. In Jost's present group, the Mennonite Brethren, it divided pretty evenly: 31.5% accepted full military service; 31.9%, noncombatant service; 36.4% insisted upon civilian service. As to the group in which Jost was brought up, the Krimmer Mennonite Brethren, the percentages are 48.1%, 15.5% and 36.3% respectively.[1] But, however one looks at it, among the nonresisters, those who, like Jost, refuse *all* military duty are in the lead. And these figures further illustrate the fact which even the trial judge acknowledged—that despite the historic principle of nonresistance, individual Mennonites, in common with most Reformation creeds, may accommodate their own consciences.

We turn from Mennonite faith in practice to a consideration of doctrine. What in fact has been the religious training and belief of the Mennonites "as a whole" from the earliest days? Although this matter is not in any true sense at issue in this case, a brief examination of it is essential to put in perspective the serious questions which are presented here, and to underline the grave importance of these questions to millions of our people, citizens as well as those who hope one day to become citizens.

Conrad Grebel was the principal founder of the Swiss Brethren Church from which the Mennonites descend. In 1524 he wrote:

> "The Gospel and those who accept it are not to be protected with the sword, neither should they

[1] Hershberger, The Mennonite Church in the Second World War, p. 39 (1951).

thus protect themselves . . . True, believing Christians are as sheep in the midst of wolves . . . They must be baptized in anxiety and trouble, tribulation, persecution, suffering, and death. They must be tried in the fire and must reach the fatherland of eternal rest, not by overcoming bodily enemies with the sword, but by overcoming spiritual foes. They use neither the worldly sword nor engage in war, since among them taking human life has ceased entirely, for we are no longer under the Old Covenant." Horsch, *The Principle of Nonresistance as Held by the Mennonite Church*, pp. 18-19 (2d ed. 1940).[1]

The first confession of faith of the Swiss Brethren was drawn up in 1527. It contains this article:

"Jesus Christ has made us free from the servitude of the flesh and meet for the service of God through the spirit which He has given us. Therefore we shall surely lay down the unchristian, yea Satanic weapons of force, such as sword, armor and the like, together with all their use, whether for the protection of friends or against personal enemies; and this is the strength of the words of Christ, 'I say unto you that ye resist not evil.'" *Id.* at 20.

An account of the consistent teaching of this doctrine throughout the 16th, 17th and 18th centuries is contained in the work just cited. We push on to the recent past, pausing only to note two passages from Mennonite teachings (cited by Jost in this proceeding, R. 46), the first printed in 1768, the second in 1791:

"May church members take part in military service?

"No, not by any means." *Id.* at 52.

* * * *

"Ques. May a member of the church take part in military service?

[1] This book was introduced in evidence as Exhibit 4 (R. 40).

"Ans. No, for the weapons of our warfare are not carnal but spiritual (II Cor. 10:3, 4; Eph. 6:12), and moreover it was foretold by the prophets concerning the time of the Gospel of grace that the swords should be made into plowshares and the spears into pruning hooks (Isa. 2:4; Micah 4:3). This concurs with the words of Jesus, Matt. 26:52." *Id.* at 53.

In the opening years of the fourth decade of this century the growing horrors of hate and bigotry and the preparations for war in Europe led all Mennonites to search their consciences and prepare themselves for the catastrophe to come. Correspondence opened between the European and American groups. In early 1936, the Dutch Mennonite Committee Against Military Service drafted a Mennonite Peace Manifesto and sent it to the American Peace Problems Committee for signatures. It was signed by 140 leaders of eight Mennonite Groups in America. On the Fourth of July, 1936, it was endorsed by the Third Mennonite World Conference held in the Netherlands. Among those endorsing it were representatives of the Mennonite Brethren Church of North America. It was thereupon published and sent to all Mennonite Groups in Europe, North America and South America. It reads:

"MENNONITE PEACE MANIFESTO

"We, the undersigned Mennonite groups, organizations, and individuals, scattered throughout the world,

"Believing in the Gospel of Jesus Christ which calls men to the service of peace and to stand against the sin of war,

"And being convinced that God condemns the atrocious means and measures of war which are now being prepared by all nations in a constantly increasing stream,

"Call all Mennonites throughout the world to fulfill the task entrusted to us by the history of our Mennonite forefathers, in the propagation of the Gospel of peace.

"We therefore appeal to all brethren and sisters to witness vigorously to our peace testimony in our congregations everywhere, and to work together to the end that we may give spiritual and material help to all who are convinced that God has called them to refuse military service, as well as to all others who may be called upon to suffer for their peace convictions." Hershberger, *The Mennonite Church in the Second World War,* p. 7 (1951).

If any declaration of faith could ever be said to spring from "the organization as a whole", this is it.[1]

On January 10, 1940, representatives of the historic nonresistance churches—the Mennonites, the Friends, the Church of the Brethren—called on President Roosevelt and later Attorney General Murphy, Solicitor General (now Mr. Justice) Jackson and Secretary Woodring regarding the forthcoming draft act. Here, as before the House and Senate Committees in the summer of 1940, they put forward the need for complete exemption from military service for men with

[1] See also a comprehensive statement of convictions adopted in 1937 by "The Mennonite Church", the largest of the American groups, which was accepted and published by the United States Selective Service System as a statement of the position of the Mennonites in this country. This opposed all military service, combatant and noncombatant, including service "during wartime under civil organizations temporarily allied with the military in the prosecution of the war, such as the YMCA, the Red Cross, and similar organizations which, under military orders, become a part of the war system in effect, if not in method and spirit, however beneficial their peacetime activities may be." SELECTIVE SERVICE SYSTEM, SPECIAL MONOGRAPH No. 11, VOL. 1, CONSCIENTIOUS OBJECTION, pp. 10-11 (1950).

conscientious objection to it in any form. Hershberger, *The Mennonite Church in the Second World War,* pp. 14-15 (1951). Although in the bill as introduced this was not done, the Selective Training and Service Act of 1940, as enacted, provided that all persons "who by reason of religious training and belief" were conscientiously opposed to all forms of military service, should "be assigned to work of national importance under civilian direction." 54 STAT. 889 (1940).

In 1948, as noted above (p. 14), a conference of the Mennonite Brethren Church of North America (one of the two groups with which Arthur Jost has been affiliated) adopted a resolution which permitted those who could conscientiously do so to accept noncombatant service in the Medical Corps (R. 44, 45-46; see Jost's comments, R. 48-49). But this latitudinarian concession found no favor with "the organization as a whole". At a Conference on Nonresistance held by representatives of the Mennonite and the Brethren in Christ Churches of North America at Winona Lake, Indiana, November 1950, a comprehensive "Declaration of Christian Faith and Commitment" was drawn up. It contained this article:

> "We cannot compromise with war in any form. In case of renewed compulsion by the state in any form of conscription of service or labor, money or goods, including industrial plants, we must find ways to serve our countries and the needs of men elsewhere, in ways which will give significant and necessary benefits, which will keep our Christian testimony uncompromised, particularly with respect to war, and which will make possible a faithful representation of Christ and His love. We cannot therefore participate in military service in any form." National Service Board for Religious

Objectors, *Statements of Religious Bodies on the Conscientious Objector*, p. 39 (rev. ed. 1953).

This is the historic, authentic view of the nonresistance churches. It is of significance here that this very view was presented to the Senate when the original version of the McCarran bill, now the law under discussion, was before them. It was presented jointly by all three of the principal "peace churches"—Mennonites, Friends and Brethren, mentioned above. One paragraph points straight to the heart of this doctrinal point.

> "Legislation recently introduced in the Senate has caused us deep concern because of its possible effect on the eligibility for naturalization of persons of our faith who may desire to become United States citizens. We refer particularly to S. 3455, section 336. This measure as we understand it, would require military service, either combatant or noncombatant, of any applicant for citizenship and would disqualify members of the Mennonite church from receiving citizenship." 96 CONG. REC. 14484 (1950).

As set out more fully below (p. 31), the bill was accordingly amended to meet this objection.

Finally, it should be noted that as a concise statement of the principle of his religious training and belief, Jost offered the *Handbook of the Mennonite Central Committee* (3d ed. 1950) and particularly a passage on military service:[1]

> "We can have no part in carnal warfare or conflict between nations, nor in strife between classes, groups, or individuals. We believe that this means that we cannot bear arms personally nor directly

[1] Exh. 3, R. 40.

> aid those who do so, and that, as a consequence, we cannot accept service under the military arm of the government, whether it be combatant or noncombatant, which ultimately causes us to be responsible for the destruction of life, health, and property of our fellow men. This applies to all wars whether they be designated defensive or offensive." *Id.* at 23.

As is clear from the Handbook, the Mennonite Central Committee—of which Jost serves as West Coast Administrator—is the official Mennonite body to provide what William James called "the moral equivalent for war." The position on military service in the Handbook is taken almost verbatim from the Declaration of 1937 of "The Mennonite Church" (*supra*, p. 19, n. 1), which the United States Government accepted as an accurate statement of Mennonite teaching. Despite this, the naturalization examiner and the trial judge held that the principles in the Handbook of the Central Committee were not relevant because, in the view of the examiner and the judge, the Committee was not a doctrinal but a social service organization and could not speak for any group or organization (R. 11, 24). Plainly fact is to the contrary—the statement from the Handbook was both an official Mennonite position and Arthur Jost's own confession of faith.

3. The Opinions Below, or Why the Case Is Here

This case should never have troubled this Court. The Commissioner of Naturalization comprehended it and resolved it understandingly and according to law. But we live in a troubled time when wisdom is diluted by fear, when views slowly built by the experience and suffering of long ages are rent like a temple by an earthquake. And so a matter, inherently simple, has

to be brought here for assurance that the perplexities of our generation shall not undo the solution which past generations have so painfully evolved for these very problems.

The source of the difficulty presented here is found in the utter bafflement of the trial judge by the doctrine of extreme nonresistance. He is not alone in this. Indeed, he is in the great majority. His error lay not in the earnestness and sincerity of his effort to understand, but in the belief that it was his task and function to understand. That step, hard as it was and is, had been made by others (skipping centuries, by this Court and the Congress), and his duty was only to see to it that the petitioner, Arthur Jost, strange as it might seem to the judge, truly believed by religious training and conviction this most difficult of all doctrines.

Even a cursory review of the record and opinion reveals the judge's deep travail. Much of the transcript of the hearing (R. 68-82) is devoted to a probe of petitioner's conscience by the judge. In his opinion, the judge's account of this long exchange with Jost does not break the usual mold of reports on arguments. The reporter naturally finds his own performance the more satisfactory. The issue, the judge said, was whether in refusing military service in the war and now Jost was acting in good faith (R. 89). As it turned out, this meant, not an inquiry into what Jost's religious convictions about military service really were, but whether what he believed was comprehensible to the judge. By a process of intellectual alchemy Jost's honest belief could exist only within the judge's limitations.

"When asked to quote," the opinion states, "the part of the Bible which literally forbids non-combatant service, he could not do so, but indicated his belief is based in his 'interpretation' of certain parts of Jesus'

Sermon on the Mount, and he referred to the words 'Thou shalt not kill' and 'Resist not evil' found in the 21st and 39th verses of the 5th chapter of Matthew." (R. 24).

Now this is a most inadequate account of a very considerable theological discussion in the course of which Jost read a good part of Fifth Matthew. But the key words are "which literally forbids non-combatant service" and "his interpretation." Of course on the first issue as framed the judge wins because the words "non-combatant service" do not appear in Matthew or the Bible and so cannot be "literally" forbidden. But on the second—the reference to "his (Jost's) interpretation"—the judge is quite out of bounds. The "interpretation" given was that, not merely of Jost, but of the Mennonite church for over four hundred years. It begins with the first confession of faith of the Swiss Brethren in 1527 which cites exactly the same passages of St. Matthew (*supra*, pp. 16-17).

The judge's quarrel is not really with Jost but with the Mennonites and the scriptural authenticity of the doctrine of nonresistance.

Thus the judge was able to understand, he says, that one's own life is to be cheap or dear as one chooses. But he cannot understand—and he keeps coming back to it—how one can conceivably refuse to strike a blow to protect those who look to one for protection, wife, children, mother, one's country, the very institutions which give one freedom to believe anything. To him every instinct of manliness, of honor, every tradition of our history—which he movingly invokes—every patriot grave, cries out against it. Again and again he attempts the barrier to understanding, only to fall back defeated and frustrated. See, especially, R. 72-80, and opinion, R. 24-25.

This Court is not concerned with the fact, as such, that a sincere and convinced man has not been able to carry his thought to the mind of another, equally sincere and convinced. But it is concerned that this human failure has given rise to what we rightly call a grave federal question. For the *ratio decidendi* of the trial court—the intellectual scaffolding upon which the spiritual dilemma rests—is this. Having been wholly unable to understand or even conceive of the basic doctrine of nonresistance and its Biblical and historical sources as Arthur Jost sought to explain them to him, the judge fell back on a superficially easy but totally erroneous means of disposing of this bothersome problem: He reasoned, as did the naturalization examiner, that petitioner's statutory burden of proving that opposition to military service of any kind, combatant or noncombatant, was by reason of "religious training and belief" could not be sustained unless it could be proved that his organization as a whole in fact taught, instructed or trained its membership to refuse to perform all such service. The judge then concluded, as he put it, that the Mennonite Brethren Church, "the particular Sect to which petitioner professes to belong, does not now teach, as part of its creed, that the wearing of the uniform in non-combatant service is forbidden." (R. 25).[1] He added that the

[1] Throughout the discussion of nonresistance, this question of the uniform keeps cropping up, utterly bemusing the participants. See, *e.g.*, comment of naturalization examiner during trial at R. 63. Where, Jost is asked, in the Church's teachings, is wearing the uniform forbidden? (R. 44). What begins as a figure of speech, ends as an issue. Jost points out that the uniform as such of course is not mentioned; "the emphasis should not be so much on the wearing of the uniform as becoming a part of the military machine" (R. 85). This to him is participation in war and for-

evidence showed that many other members of the Mennonite faith had in fact served as noncombatants in the armed forces in World War II. Arthur Jost was therefore not entitled to take the alternate oath prescribed by the statute and so was not entitled to be naturalized. Q.E.D.

Furthermore, as we read the record of the judge's theological argument with petitioner and the resulting opinion, we see bewilderment yielding to indignation and indignation to contempt and suspicion. After citing various provisions of the Declaration of Independence and of the Constitution with respect to defense and military affairs, and after quoting approvingly from the overruled cases of *United States* v. *Schwimmer*, 279 U.S. 644, and *United States* v. *Macintosh*, 283 U.S. 605,[1] the opinion summarizes at length, in the language of one deeply stirred by patriotic instincts, our great military campaigns between Valley Forge and Korea. For example, neither he nor Congress, said the judge (R. 28), had forgotten

> "the grim, determined faces of the men who stemmed the tide of the Hun flood against such impossible odds at Chateau Thierry, while there still echoed in their ears the shouts of 'Le Boche, Le Boche,' 'Mort, Mort' from the motley stream of

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bidden. But it is no use. The judge rightly declares (R. 31) that the wearing of the uniform of the armed forces of the United States is a distinct honor, and he finds no Mennonite doctrine or creed which forbids it to be worn.

[1] It will be recalled that these decisions, interpreting earlier naturalization statutes as implying a promise to bear arms as a condition of naturalization, were specifically overruled in 1946 by this Court in Girouard v. United States, 328 U.S. 61. See *infra*, pp. 30-31.

> frightened, fleeing, bewildered, soldiers, men, women and children;"

nor had they forgotten (R. 29)

> "The mosquito covered rice paddies, the drenched forests and bottomless mud which formed the background for bullets and shells and death to the young Americans who gave their lives and bodies and minds at Leyte that not only America, but their brothers of the Philippines might have liberty and freedom of mind and conscience".

And so the opinion proceeds, as might have been expected, with a bitter excoriation of Arthur Jost (R. 30-31):

> "This is a man who stated from the witness stand that he would not defend his infant child from the murderous attack of a ruffian, but would in such case 'call the authorities'.
>
> "This is a man who would give women folks to rape by an invader or a ruffian without lifting a finger in their defense.
>
> * * * *
>
> "This is the man who, when the roar of the invader sounds in the distance, will run 'to the authorities for help'.
>
> "This is the man who says he will teach our young men to lie limply down and to allow our country to be overrun by the hordes of any modern 'Genghis Khan' who sees fit to come.
>
> * * * *
>
> "This man states that his forbears fled from Russia to escape the persecution by the Bolshevics on account of their religion and he admits that the Communists would persecute him and his Sect here just as quickly as they would in Russia if they gained control. But he seeks to hide behind

the bodies of other young Americans in order that he might have religious freedom without an effort on his part.

"If this man really believes his professed doctrine of nonresistance, the Court is unable to understand why he does not willingly return to the Russia from which his forbears came, to there endure, in the weak, spineless, amoebic passivity he espouses and claims for his creed, the buffetings of scoundrels from which the blood, sweat, and tears of others here protects him. Why should he desire citizenship in a country whose Constitution clearly shows its policy to be to protect its citizens and homes by force of arms, if need be. How can he, in all honesty, knowing the policy on this subject which our Constitution so succinctly states, say from the witness stand that he believes in the principles of our Constitution and will support the Constitution?"

Inevitably, the judge concludes that this Court and the Congress could not have meant what both have plainly said, and that, accordingly, Arthur Jost was not entitled to take the alternative oath prescribed by Congress for conscientious objectors, and so was not entitled to be naturalized.

The District Court of Appeal for the Fourth Appellate District affirmed the decision of the trial judge on the ground that, in view of the statutory burden of proof, the determinations of fact of the court below were justified by "conflicting" evidence.[1] It interpreted the Congressional mandate of "clear and con-

[1] The appellate court properly pointed out that the trial judge was wrong if, as his opinion indicates, he meant also to hold that petitioner could not in any event be attached to the principles of the Constitution if he was a true conscientious objector (R. 102), but it nevertheless affirmed the judgment.

vincing evidence" as requiring proof beyond doubt (R. 104), and it considered that it was required to affirm the discretionary determination of the trial court if the latter's finding was based on any "reasonable inference".

There is, of course, evidence that some Mennonites can reconcile noncombatant military service with their consciences. It is the fact. But there is no conflict in the evidence that petitioner's religious training and belief have led him to accept as a foundation of his faith the historic teaching of his church to the contrary. The District Court of Appeal thus made the same understandable but serious mistake of confusing an opinion on conflicting evidence with evidence of conflicting opinion. In doing so, it not only did a great injustice to petitioner, but it approved an interpretation and application of an important federal statute which totally disregards carefully considered determinations of both Congress and of this Court.

REASONS FOR GRANTING THE WRIT

The denial to petitioner of the right to take the alternative oath of allegiance set forth in § 335 of the Nationality Act of 1940, as amended by § 29 of the Internal Security Act of 1950, presents a federal question of great importance in the administration of the naturalization laws and will have far-reaching consequences for the many desirable prospective citizens whose religious scruples compel them to support their adopted country in ways other than participation in military service. Such denial is squarely in conflict with the principles announced by this Court (and specificially adopted by Congress) in *Girouard* v. *United States*, 328 U.S. 61, and with their application *per*

curiam in *Cohnstaedt* v. *Immigration and Naturalization Service*, 339 U.S. 901.

I

In *Girouard* v. *United States, supra*, this Court overruled several prior decisions and held that the oath originally required by § 335 of the Nationality Act of 1940 (and previous statutes) did not imply a promise on the part of a genuine conscientious objector to render combatant military service as a prerequisite to citizenship. In *Cohnstaedt* v. *Immigration and Naturalization Service, supra*, this Court applied the same rule to a petitioner for naturalization who, exactly like the petitioner here, objected on religious grounds to *noncombatant* as well as combatant military service. See 167 Kan. 451, 207 P. 2d 425 (1949). Unless by the amendments of the Nationality Act of 1940, which it included in the Internal Security Act of 1950, Congress intended to set aside or restrict the liberal rule announced in these cases, the decision below is clearly in conflict with them and must be reversed.

In fact, there are several plain indications that Congress intended to adopt and codify the rule of the *Girouard* case, not to repeal or restrict it, when it enacted § 29 of the Internal Security Act of 1950. The legislative history of this provision shows further that Congress was well aware of and intended particularly to give effect to the varying religious objections to military service held by members of the Mennonite and other historical "peace" churches.[1] This history also

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[1] 96 Cong. Rec. 14483-84, 15719 (1950). See also, with respect to the reenactment of these provisions in the Immigration and Nationality Act of 1952, *Joint Hearings Before the Subcommittees of the Committees on the Judiciary on S. 716, H.R. 2379 and H.R. 2816*, 82d Cong., 1st Sess., pp. 760-61 (1951); 98 Cong. Rec. 4422-23 (1952).

makes it clear beyond peradventure that Congress meant to make available the alternative oath to those who had religious scruples against *noncombatant* as well as combatant service in the armed forces.

As originally introduced, the McCarran bill (which eventually became the Internal Security Act of 1950) contained a proposed amendment to the Nationality Act of 1940 which would have required some form of combatant or noncombatant military service on the part of all petitioners for naturalization. See S. 4037, SEC. 30, 81st Cong., 2d Sess. (1950), as introduced August 10, 1950. As noted above (p. 21), this provision was strenuously opposed by representatives of all three of the principal "peace churches", and as a result the bill was amended to include the provisions here involved. The purpose of these changes was clearly explained by Senator McCarran on the floor of the Senate:

> "However, to make doubly sure that the true conscientious objector, even though he be an alien applying for the high price of citizenship, would not be required to take an oath in violation of his conscience in order to obtain American citizenship, the present oath, which makes no provision for bearing arms, or engaging in noncombatant service, is to be available to those persons who, by reason of religious training and belief, cannot in good conscience promise either to bear arms or to engage in noncombatant service." 96 CONG. REC. 14183 (1950).[1]

[1] A further indication that Congress did not intend in § 29 of the Internal Security Act of 1950 to make naturalization unavailable to anyone who might have been naturalized under the *Girouard* rule prior to the amendment is found in the fact that the amendment is made applicable from the date of its enactment, without any exception for pending petitions filed theretofore. A savings clause of this type designed to maintain the status quo in naturali-

By incorporating into the statute the interpretation of the earlier naturalization oath which this Court had announced in the *Girouard* case, Congress adopted the standard for conscientious objectors which was contained in the Selective Training and Service Act of 1940 (54 STAT. 889) and later in the Selective Service Act of 1948, as amended (62 STAT. 612): opposition to military service "by reason of religious training and belief".

The original World War I draft Act of May 18, 1917, § 4 (40 STAT. 78), provided an exemption only for those conscientious objectors who were members "of any well-recognized religious sect or organization . . . whose existing creed or principles forbid its members to participate in war in any form". When Congress came to enact the Selective Training and Service Act of 1940, however, this limitation was specifically re-

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zation proceedings is customarily inserted in naturalization legislation making a substantive change in procedures in effect under prior statutes. See HOUSE COMMITTEE PRINT, NATIONALITY LAWS OF THE UNITED STATES (Message from the President of the United States), 76th Cong., 1st Sess., p. 63 (1939); Section 405(b) of the Immigration and Nationality Act of June 27, 1952, 66 STAT. 280. In keeping with this settled procedure, § 29 of the Internal Security Act would have been made inapplicable to pending petitions if it were designed to be more restrictive than the earlier provision. Significantly, another amendment to the Nationality Act of 1940 which was incorporated, like § 29, into the Internal Security Act, was specifically made inapplicable to pending petitions for naturalization because it was more restrictive on the requirements for naturalization of aliens serving on certain American vessels. See § 26 of the Internal Security Act of 1950, amending § 325 of the Nationality Act of 1940, 64 STAT. 1015 (1950); H.R. REP. No. 3112, 81st Cong., 2d Sess., p. 61 (1950).

In fact, the petition for naturalization here was filed on May 25, 1950, several months before the enactment of the Internal Security Act of 1950.

jected. The legislative history, as well as the subsequent judicial interpretation of this statute, clearly discloses that in making the test of conscientious objection that of the individual's own "religious training and belief", Congress intended in the Selective Training and Service Act to eliminate any requirement of membership in an organized religious sect or group having such objection as one of its tenets. See, *e.g., Hearings before the Committee on Military Affairs on H. R.* 10132, 76th Cong., 3d Sess., pp. 1201-11 (1940); 86 CONG. REC. 10106 (1940); *United States* v. *Kauten*, 133 F. 2d 703 (2d Cir. 1943); *United States* ex rel. *Phillips* v. *Downer*, 135 F. 2d 521 (2d Cir. 1943); *United States* v. *Bowles*, 131 F. 2d 818 (3d Cir. 1942), *aff'd on other grounds*, 319 U.S. 33. This rule continued under the Selective Service Act of 1948. *George* v. *United States*, 196 F. 2d 445, 448-49 (9th Cir. 1952), *cert. denied*, 344 U.S. 843; *United States* v. *Alvies*, 112 F. Supp. 618 (N.D. Cal. 1953); *United States* v. *Everngam*, 102 F. Supp. 128 (S.D. W. Va. 1951)[1] In the

[1] Under the Selective Training and Service Act of 1940 there developed some conflict in the decisions as to whether a sincere philosophical objection to military service, unrelated to belief in a Supreme Being, was sufficient to satisfy the requirement of "religious training and belief". *Compare* United States *ex rel.* Reel v. Badt, 141 F. 2d 845 (2d Cir. 1944), 152 F. 2d 627 (2d Cir. 1945), *petition for cert. dismissed*, 328 U. S. 817, *with* Berman v. United States, 156 F. 2d 377 (9th Cir. 1946), *cert. denied*, 329 U. S. 795. As a result, Congress, when it enacted the Selective Service Act of 1948, further defined the phrase "religious training and belief" as "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code." (62 STAT. 613, as amended, 50 U. S. C. APP. § 456(j)). This same definition was in turn incorporated into the Immigration and Nationality Act of 1952, 66 STAT. 258-59, 8 U. S. C. § 1448, which repealed and reenacted (with this

very recent *Alvies* case, the District Court for the Northern District of California held that the fact that a draftee did not belong to any particular religious sect or organization did not itself constitute substantial evidence or provide a "basis in fact" to support denial of his classification as a conscientious objector. Similarly, in the *Everngam* case the District Court for the Southern District of West Virginia held that denial of a conscientious objector's classification to defendant on the ground that he was "in total error" in basing his claim on the teachings of the Roman Catholic Church was arbitrary and therefore invalid.

All of these decisions seem clearly in conflict with the decision below,[1] where petitioner's amply corroborated testimony about his personal religious training and belief was quite erroneously thought to be put in doubt by evidence, also unchallenged, that some of his co-religionists did not feel they were required to go so far as to refuse all military service in accordance with the historic teaching of their Church.

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change) § 335 of the Nationality Act of 1940, as amended by § 29 of the Internal Security Act of 1950. These amended provisions, now in effect, are set out for purposes of comparison in the Appendix to this petition.

Since petitioner makes no claim that his objection to military service was based on any but a genuinely religious ground, this 1952 change in the Nationality Act would have no bearing on the decision below even if it were applicable.

[1] That Congress has intended the standard of "religious training and belief" to be consistently interpreted under the selective service and naturalization laws was made clear in the Conference Report on the 1952 Act. H.R. Rep. No. 2096, 82d Cong., 2d Sess., p. 129 (1952).

II

The decision below will defeat the declared purpose of Congress in amending the naturalization law and will frustrate a wise and humane development in legislative policy.

The representations which were made to the Senate in favor of permitting conscientious objectors to noncombatant military service by reason of religious training and belief to take the alternative oath (*supra*, p. 21) and which were adopted by Senator McCarran and the Congress (*supra*, p. 31) were made by the three nonresistance churches—the Mennonites, the Friends and the Brethren. All of these churches leave the application of their teaching to the individual conscience of their members. They do not believe in any form of compulsion of the conscience. Indeed, they have no form of organization designed to effect internal regimentation or discipline of opinion or action.

Accordingly, there is among the members of these churches diversity of opinion upon accepting or refusing noncombatant military service. This diversity is tolerated by the churches. Therefore, the interpretation of the statute adopted in this case would deny the benefit of the statute to the very persons to whom Congress intended to extend it. For if the "organization as a whole" cannot be said to train its members that nonmilitary service is contrary to the teaching of Christ because it leaves to their individual conscience the final decision, then neither Mennonites, Friends, nor Brethren who conscientiously accept the training can qualify under that interpretation.

This is plainly not the intent of Congress. Its purpose was—as it was in the selective service acts—to

extend the alternate oath, in the one case, and purely civilian service in the other, to those who are trained and conscientiously believe that the Divine and Supreme Ruler of the Universe, through the teaching of His Son, our Saviour, would have them "have no part whatever in carnal warfare," but refuse "compromise with war in any form."

III

A veil of procedural formalism will not obscure from this Court the denial of a federal right.

> "Thus, whenever a conclusion of law of a state court as to a federal right and findings of fact are so intermingled that the latter control the former, it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured." (*Norris* v. *Alabama*, 294 U.S. 587, 590.)

This duty to look behind the facade of alleged factual dispute or local procedural complexity has been recognized in cases involving federal statutory as well as constitutional rights. *E.g.*, *Creswill* v. *Grand Lodge Knights of Pythias*, 225 U.S. 246, 261; *Brown* v. *Western Railway of Alabama*, 338 U.S. 294, 296. The cases make this point indisputable. [1]

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[1] Constitutional rights: Cassell v. Texas, 339 U. S. 282, 283; Craig v. Harney, 331 U. S. 367, 373; Williams v. North Carolina, 325 U. S. 226, 236; Hooven & Allison Co. v. Evatt, 324 U. S. 652, 659; Smith v. Texas, 311 U. S. 128, 130; United Gas Public Service

IV

A further grave error which will confuse and prejudice the administration of this statute, is the assumption of the trial judge supported by the District Court of Appeal, that the statutory phrase "unless by clear and convincing evidence he can show to the satisfaction of the naturalization court" means that any doubts of the judge, however conceived and however rooted in the judge's personal predelictions, support denial of citizenship.

In other contexts, courts and text-writers have generally defined "clear and convincing evidence" very differently. It is a legal, not a personal standard; and the degree of proof it connotes is "less than the degree required in criminal cases but more than required in the ordinary civil action".[1]

Whatever the precise meaning of "clear and convincing evidence ... to the satisfaction of the naturali-

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Co. v. Texas, 303 U. S. 123, 143. Federal statutory rights: Davis v. Wechsler, 263 U. S. 22, 24; Carlson v. Washington *ex rel.* Curtiss, 234 U. S. 103, 106; Southern Pacific Co. v. Schuyler, 227 U. S. 601, 611.

[1] Merrick v. Ditzler, 91 Ohio St. 256, 267, 110 N. E. 493, 496 (1915), quoted with approval in McClintock v. Sweitzer, 138 Ohio St. 324, 327, 34 N. E. 2d 781, 783 (1941). See also Northwestern Electric Co. v. Federal Power Commission, 134 F. 2d 740, 743 (9th Cir. 1943), *aff'd*, 321 U. S. 119; 9 WIGMORE, EVIDENCE § 2498 (3d ed. 1940); AMERICAN LAW INSTITUTE MODEL CODE OF EVIDENCE, RULE 703, *comment* (1942).

Some courts have disagreed and have held this standard to be merely the equivalent of the usual burden of proof in civil cases,

zation court",[1] it has never been suggested that the success of a naturalization petition is dependent on the personal whims of the judge hearing it. With respect to another statutory prerequisite to citizenship, the Court of Appeals for the Fourth Circuit has held:

> "The test which the statute prescribes is good moral character as that term is generally understood, not the judge's idea of the 'type of man who ought to be admitted to citizenship'. . . . " *Marcantonio* v. *United States*, 185 F. 2d 934, 937 (4th Cir. 1950).

It is equally offensive to the purpose of the statute when a naturalization court, for unexpressed or inappropriate reasons, discards a petitioner's uncontradicted testimony as to his religious training and belief.[2]

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requiring only the production of a preponderance of the evidence, *e.g.*, Virginia Fire & Marine Insurance Co. v. Hogue, 105 Va. 355, 54 S. E. 8 (1906); while other courts have on occasion interpreted the phrase as the equivalent of proof "beyond a reasonable doubt", *e.g.*, Southwestern Bell Telephone Co. v. San Antonio, 4 F. Supp. 570 (W.D. Tex. 1933), *rev'd on other grounds*, 75 F. 2d 880 (5th Cir. 1935), *cert. denied*, 295 U. S. 754.

[1] Thus, the conferees, in explaining the provision in the 1952 Act, said only that a petitioner's convictions must be "properly proved" to the naturalization court. H.R. Rep. No. 2096, 82d Cong., 2d Sess., p. 129 (1952).

[2] Krausse v. United States, Papp v. United States, 194 F. 2d 440, 444 (2d Cir. 1952).

The issue which the trial judge and the California appellate court, in its affirmance, have raised as to the proper limitations of inquiry in a naturalization proceeding will be crucial to many prospective petitioners and should be resolved by this Court.

CONCLUSION

It is accordingly urged that a Writ of Certiorari to review the judgment of the District Court of Appeal for the Fourth Appellate District of California should be granted.

Respectfully submitted,

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APPENDIX

IMMIGRATION AND NATIONALITY ACT OF 1952
66 STAT. 258-59, 8 U.S.C. § 1448

"OATH OF RENUNCIATION AND ALLEGIANCE

"Sec. 337. (a) A person who has petitioned for naturalization shall, in order to be and before being admitted to citizenship, take in open court an oath (1) to support the Constitution of the United States; (2) to renounce and abjure absolutely and entirely all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which the petitioner was before a subject or citizen; (3) to support and defend the Constitution and the laws of the United States against all enemies, foreign and domestic; (4) to bear true faith and allegiance to the same; and (5) (A) to bear arms on behalf of the United States when required by the law, or (B) to perform noncombatant service in the Armed Forces of the United States when required by the law, or (C) to perform work of national importance under civilian direction when required by law. Any such person shall be required to take an oath containing the substance of clauses (1) through (5) of the preceding sentence, except that a person who shows by clear and convincing evidence to the satisfaction of the naturalization court that he is opposed to the bearing of arms in the Armed Forces of the United States by reason of religious training and belief shall be required to take an oath containing the substance of clauses (1) through (4) and clauses (5) (B) and (5) (C), and a person who shows by clear and convincing evidence to the satisfaction of the naturalization court that he is opposed to any type of service in the Armed Forces of the United States by reason of religious training and belief shall be required to take an oath con-

taining the substance of clauses (1) through (4) and clause (5) (C). The term 'religious training and belief' as used in this section shall mean an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. In the case of the naturalization of a child under the provisions of section 322 or 323 of this title the naturalization court may waive the taking of the oath if in the opinion of the court the child is unable to understand its meaning."

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 468

ARTHUR JOST, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT

MEMORANDUM FOR THE UNITED STATES

STATEMENT

On May 25, 1950, petitioner filed a petition for naturalization in the Superior Court of Fresno County, California (R. 1-5). He sought, as a conscientious objector, to take the alternative oath prescribed by Section 335(b)(2) of the Nationality Act of 1940, as amended by Section 29 of the Internal Security Act of 1950.

Pursuant to Section 333(a) of the Nationality Act of 1940, as amended (8 U.S.C., Supp. V,

733(a)), the application was referred to a naturalization examiner for preliminary examination and recommendation. The examiner found that petitioner was a member of the Mennonite Church, and that during World War II he had been classified as a conscientious objector to both combatant and noncombatant military service, and had served approximately four years under the Civilian Public Service Program. He noted that petitioner stated that "he is willing to render medical service during war time as a civilian, even to the extent of going on the field of battle, but stresses that this medical service must be as a civilian and not under the direction of the Armed Forces" (R. 10). The examiner reported, however, that interviews with ministers and active members of the Mennonite Church showed that they did not regard the performance of noncombatant service as incompatible with Mennonite beliefs (see R. 53-64). He found the Mennonite Central Committee, a publication of which had been submitted by petitioner to support the claim that his views stemmed from religious beliefs, to be a charitable organization so that its views were not a binding expression of the views of the church itself (R. 10-11). The examiner concluded (R. 12):

> * * * It may be that resolutions have been passed at General Conferences of the Mennonite Brethren organizations, and that it might be the opinion of certain leaders of the organization that its members should refrain from bearing arms or performing noncombatant service, but it is maintained that if the

> organization as a whole does not teach, instruct or train its members to refuse to perform non-combatant service then the individual members cannot claim that they receive religious training through the organization to that effect. * * *

Accordingly, he recommended that the petition be denied (R. 13).

Pursuant to Section 333(b) of the Nationality Act, as amended, the recommendation of the examiner was transmitted to the Commissioner of Immigration and Naturalization. The Commissioner filed a report recommending naturalization (R. 14-22). The Commissioner noted that publications of the Mennonite General Conference in 1917 and 1922 had taken a stand against becoming a part of the military establishment (R. 18-19) and that statistics as reported by the church showed that during World War II about fifty per cent of the Mennonites subject to the draft chose civilian public service (R. 21).

Both reports were submitted to the naturalization court. Petitioner testified and was questioned extensively by the court (R. 64-82). Reimer, a witness called by petitioner, testified that he had nothing "to show that it is the teaching of the Mennonite Church that members of that church should abstain from the wearing of the uniform, or performance of non-combatant service" (R. 83). In answer to petitioner's question whether the witnesses who were interviewed by the examiner presented "a conclu-

sive picture of our church's teaching", Reimer replied (R. 84):

> No, I do not feel that that offers a conclusive evidence of the picture of our teaching, because we have, I am sure, a great many more that would testify the other way as regards to nonresistance. Perhaps not regarding the wearing of the uniform, but regarding—*because we do not definitely in so many words teach that they must not wear the uniform.* But regarding the matter of either serving as noncombatants or in some civilian branch. We have a great many more that would be inclined the other way. The very fact that some of these people do not testify or adhere to the full meaning or the teaching of our principles does not change the teaching. We do not—*our fundamentals do not legislate to the individual.* We teach them. When they do not adhere or do not live up to its teaching that doesn't change the fundamentals. * * * [Emphasis supplied.] [1]

The following colloquy then occurred between the court and Reimer (R. 86):

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[1] Petitioner then said (R. 85):

"* * * However, it is not so much—the emphasis should not be so much on the wearing of the uniform as *becoming a part of the military machine.* These brethren who became citizens and declared they would accept the uniform, they also declared that they would become a part of the military machine. I have perhaps not—yes, I have been asked specifically about the uniform, and as far as the present law reads, as far as the present law provides the uniform is demanded in the part of becoming a soldier, demanded even under non-combatant duty, and that is where I feel our teaching has applied. * * *." [Emphasis supplied.] Reimer agreed.

The Court:

* * * * *

Q. The thing that we are concerned with here is whether or not the wearing of the uniform has something to do with the taking of human life. Isn't that it?

A. Well, of course that is in the minds of a great many of them, yes. *But we do not teach that they must not wear the uniform.* If the wearing of the uniform implied that they must thereby take life, then none of us would wear the uniform. That is clear.

Q. Well, then if the mental attitude of the person who wears the uniform is that he will not take human life and he will not participate in the taking of human life, he is well within the bounds of your teachings?

A. That is correct. [Emphasis supplied.]

The Superior Court denied the petition for naturalization. In its opinion, the court quoted its colloquy with Reimer set out above and said (R. 25):

> Thus we have from the lips of petitioner's own witness, that the particular Sect to which petitioner professes to belong, does not now teach, as part of its creed, that the wearing of the uniform *is* [in] non-combatant service is forbidden.
>
> Other parts of the evidence show that many members of the Mennonite faith actually served as non-combatant in the armed forces of the United States in World War II.

It concluded: "This Court certainly is not satisfied that petitioner's religious faith prevents him from service in the armed forces as a non-combatant" (R. 31). It therefore found that petitioner had not proved by clear and convincing evidence to the satisfaction of the court that he was opposed to non-combatant service by reason of his religious training and belief (R. 31).

On appeal to the District Court of Appeal, Fourth Appellate District, of California, that court affirmed the judgment, holding that the case involved merely a determination of fact on conflicting evidence with which the appellate court should not interfere (R. 100-110).

The Supreme Court of California denied a petition for hearing by that court (R. 111).

DISCUSSION

The Department of Justice, in administering its function of making recommendations to Selective Service Appeal Boards pursuant to Section 6 (j) of the Selective Service Act of 1948, 62 Stat. 604, 612-613, and its predecessor, Section 5(g) of the Act of 1940, 54 Stat. 885, 889, has consistently taken the position that a person may be conscientiously opposed to participation in war in any form, "by reason of religious training and belief," even though the particular denomination to which he belongs does not as a whole take such a position as part of its creed. See Selective Service System Monograph No. 11, "Conscientious Objection" (1950), Vol. I, p. 27, which summarizes the experience of the period

from 1940 to 1947. In fact, the legislative background of the Selective Training and Service Act of 1948, set forth in the Brief for the United States in *United States* v. *Nugent*, No. 540, O.T. 1952, pp. 38-51, shows that the special provisions for conscientious objectors were specifically designed to extend beyond members of the historic peace churches and to apply to those, within and without the peace churches, whose conscientious scruples based upon religious training and belief, would not permit them to serve in the armed forces even in a non-combatant capacity.

The Mennonite Church is considered one of the historic peace churches, and the Selective Service System has recognized that there are differences of opinion among its adherents as to whether this historical position will permit service in the armed forces as a non-combatant. Selective Service System Monograph No. 11 reports that from 1940 to 1947, 4610 Menonites were assigned to Civilian Public Service Camps and states (pp. 320, 321):

> The Mennonite bodies not only furnished Civilian Public Service Camps with the largest number of objector assignees but they also furnished the largest proportion of these Class IV-E registrants as related to their membership, of any church among the larger denominations.

Thus, the recommendation of the Commissioner of Immigration and Naturalization that the petition for naturalization be granted was in full accord

with the Department's position with respect to the conscientious objector provisions of the Selective Service Act.

Section 335(a) of the Nationality Act of 1940, as amended, requires that the naturalization court, and not merely the executive branch, be satisfied "by clear and convincing evidence" that the petitioner's opposition to non-combatant service is "by reason of religious training and belief." If there were in this case any question of credibility or of a resolution of conflicting evidence, we would agree with the California District Court of Appeal that the findings of the trier of the facts should not be disturbed. However, there is no dispute that petitioner, a prominent member of the Mennonite Church, has consistently held the beliefs which he maintained before the naturalization court, and that his sincerity was recognized and acted upon during World War II. Thus, the decision of the trial court seems to us to rest on a question of law rather than on a question of fact, i.e., whether the words "religious training and belief" as used in the Nationality Act of 1940, as amended, require that opposition to non-combatant service be the specific and uniform teaching of the religious body to which the applicant belongs.

We do not believe that such was the intent of Congress, and certainly not as to the group here involved, a large proportion of whose adherents do interpret the general teachings of the church in the same manner as petitioner. As we have pointed out, the words "religious training and belief" have not

been so interpreted in the administration of Selective Service. Congress must have been aware of the Selective Service interpretation of the words "religious training and belief" when it used the same words in Section 29 of the Internal Security Act of 1950 to amend the section of the Nationality Act. It had, in the Selective Service Act of 1948, re-enacted in substantially similar form the provisions of the Selective Training and Service Act of 1940 relating to conscientious objectors,[2] and during the course of debate thereon, approval had been expressed of the way in which the conscientious objector problem had been handled (94 Cong. Rec. 7305, 7306; see our brief in the *Nugent* case, pp. 50-51). It seems evident that the provisions of the Internal Security Act here involved were intended, in general, to have the same scope as had been given to the similar language in the Selective Service Act. In fact, as the petition in this case points out, the provisions for naturalization of conscientious objectors to non-combatant service were inserted to meet objections by three peace churches, of which the Mennonites were one, that the statute did not

[2] Section 6(j) of the 1948 Act did provide, as the 1940 Act did not, that conscientious objections to participation in war in any form must rest on an individual's belief in relation to a Supreme Being and not on "essentially political, sociological, or philosophical views or a merely personal code." This further definition was incorporated into Section 337 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 258-259. The Department has, however, interpreted that section of the 1948 Act as overruling such decisions as *United States ex rel. Reel* v. *Badt*, 141 F. 2d 845, 152 F. 2d 627 (C.A. 2), certiorari dismissed, 328 U.S. 817, and not as limiting the exemption to members of peace churches which make objection to non-combatant service a part of their creed.

provide for naturalization of those of their members who are conscientiously opposed to such service. 96 Cong. Rec. 14183-14184. Since, in none of the peace churches do all members claims to be conscientiously opposed to non-combatant service (see Selective Service Monograph No. 11, pp. 321-322), and, as we understand it, many of these peace churches leave it to individual conscience to decide whether non-combatant service is compatible with their pacifist teachings, the provision for an oath by persons opposed to non-combatant service would be largely meaningless if interpreted as applying only to those who belong to a denomination which teaches as part of its creed that non-combatant service as such is absolutely prohibited.

In deciding whether a person's views are based upon "religious training and belief," it may not be possibly wholly to avoid consideration of the religious teachings of the group from which his belief stems. But in this case, we believe it is enough that the facts of record show that a large body of the adherents of petitioner's faith do interpret its teachings as he does and that he sincerely adheres to that interpretation. It is the province neither of the executive nor the courts to determine what are the "true" teachings of a religious body.

CONCLUSION

If the Court agrees with our analysis of the case, we suggest that an appropriate disposition would be that, without further briefs or argument, the petition for a writ of certiorari be granted, the judg-

ment of the District Court of Appeal reversed, and the cause remanded to the Superior Court of Fresno County with directions to admit petitioner to citizenship.

Respectfully submitted,

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JANUARY 1954.

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DECISIONS PER CURIAM AND ORDERS FROM FEBRUARY 1, 1954, THROUGH JUNE 7, 1954.

FEBRUARY 1, 1954.

Decisions Per Curiam.

No. 468. JOST *v.* UNITED STATES. On petition for writ of certiorari to the District Court of Appeal of California, Fourth Appellate District. *Per Curiam:* The petition for writ of certiorari is granted. The judgment of the District Court of Appeal is reversed and the cause is remanded with instructions to proceed not inconsistent with the findings of fact and conclusions of law and recommendations of the Commissioner of Immigration and Naturalization, on confession of error by the Government. *Dean Acheson, W. Graham Claytor, Jr., Charles A. Horsky, A. L. Wirin* and *Fred Okrand* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Olney, Robert S. Erdahl* and *Beatrice Rosenberg* filed a memorandum for the United States, confessing error. Reported below: 117 Cal. App. 2d 379, 256 P. 2d 71.